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THE chair in the Law Department of Washington and Lee University, made vacant by the resignation of Professor Charles A. Graves, to accept a chair in the Law Department of the University of Virginia, has been filled by the election of Professor William L. Clark, of the Catholic University of Washington. Professor Clark has an enviable reputation as a law writer, and will prove a valuable acquisition to the cause of legal education in Virginia. We congratulate Washington and Lee upon so excellent a choice, and extend to Professor Clark a hearty welcome back to old Virginia and his native heath.

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THE infamous case of *Lord Audley* (3 How. St. Tr. 402) has recently been paralleled in Louisiana, where a husband was indicted for a rape upon his wife. The proof was that he held the wife by the throat while another committed the act of sexual intercourse with her. On a previous trial of the actual perpetrator of the crime, he was acquitted. Upon the subsequent trial of the husband he was found guilty, under the Louisiana statute, declaring principals in the second degree indictable and punishable as those in the first degree. On appeal, the appellate court held that a husband cannot himself commit the crime of rape upon the person of his wife; that he may be a principal in the second degree, where he assists another in perpetrating the crime; but that the principal in the second degree cannot be convicted where the alleged principal in the first degree has been acquitted. Hence, the court ruled, the accused husband could not be convicted, and the scoundrel went unwhipt of justice under the shield of this technicality. The case is *Haines* v. *State*, 25 South. 372.

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THE opinion of the Supreme Court of Georgia, in the recent case of *Johnstone* v. *Taliaferro*, 32 S. E. 931, contains an interesting and valuable discussion of the question whether, in a limitation to a female for

life, remainder to her children, the word "children" will include bastards—where the life-tenant had no children, legitimate or illegitimate, at the date of the deed, and where the statute of the State (similar, in this respect, to the Virginia statute) renders bastards capable of inheriting and of transmitting inheritance on the part of the mother.

In the absence of statutory enactments, it is well settled that bastards are not included in the word "children," unless there are no other children but bastards at the date of the deed or will, and no reasonable probability of any, or it is plain from the instrument itself that the donor's intention was otherwise—the maxim of the common law being *qui ex damnato coitu nascuntur, inter liberos non computentur.* See 1 Minor's Inst. (4th ed.) 447, and cases cited.

In Virginia our court has recognized this rule, but has held that the effect of our statute declaring that "bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten" (Va. Code, sec. 2552) is to alter the common law rule as to the construction of the word "children," and to entitle bastards to claim under that description, in all cases where the parentage is referred to the mother, or, as Professor Minor expresses it (1 Minor's Inst. 450), "he is to be counted amongst the children of his mother, and, as a consequence, will take by virtue of a devise or gift to his mother's 'children,' just as if he were legitimate." See *Bennett* v. *Toler*, 15 Gratt. 588.

The Supreme Court of Georgia, in the case above referred to, reaches the opposite conclusion, and seems to be supported by an almost unbroken line of authorities. The court cites and comments upon numerous authorities from the various States where similar statutes exist. The Virginia case of *Bennett* v. *Toler* is distinguished, on the ground that in that case the bastard was in being at the date of the will, and was known and recognized by the testator as his daughter's son. The reasoning of Allen, P., in that case, leading to the conclusion that even had the bastard not been born at the date of the will, the result would have been the same, is disapproved.

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In many of the States, while there is a fixed legal rate of interest, there is also a conventional rate greater than the legal rate, when fixed by express contract of parties; and it is probably the better doctrine that the contract will continue to bear the extraordinary rate after

maturity *Cecil* v. *Hicks*, 29 Gratt. 6; *Cromwell* v. *County of Sac*, 96 U. S. 51, and *ca. ci.*

If the agreed rate is *greater* than the ordinary legal rate, this doctrine seems to be perfectly just, since the debtor has the power to pay the debt at maturity according to his promise, and thus avoid the further payment of interest. If he does not so pay, it is but fair to assume that he prefers to keep the money and pay the greater rate agreed upon originally. But where the agreed rate is *less* than the legal rate, and the debtor retains the creditor's money against the will of the latter, a wholly different principle ought to apply; for here the creditor having agreed to lend his money at the lesser rate only until the maturity of the debt, he ought not to be compelled to accept the lesser rate after maturity; if the debtor does not then pay, and refuses to pay, he ought to be compelled to pay the legal rate in the future; otherwise he is encouraged not to pay, and receives a reward for his delinquency. That the creditor is willing to accept a less rate for the agreed time of the loan (*e. g.*, on call) raises no presumption that the parties intended the lesser rate to continue after maturity of the debt, and after the creditor has demanded the return of the money. In the former case—where the agreed rate is greater than the legal rate—the debtor may reasonably be presumed to claim under the contract, because he has chosen to retain the money after maturity. But in the other case, claiming against the will of the creditor, and, therefore, against the contract, he ought to be required to pay the legal damages; and the legal measure of damages for non-payment of money is the legal rate of interest. In both cases the burden should be on the delinquent debtor. Where the agreed rate is *greater* than the legal rate, the burden is put upon him by compelling him to pay the extraordinary rate; where the agreed rate is *less* than the legal rate, the burden should likewise be put upon him by compelling him to pay the legal rate. If the loan were made "without interest," certainly the creditor would be entitled to the legal rate of interest after maturity. The same rule should apply where the creditor has, by contract, relinquished not all, but a part of the legal rate of interest.

Authorities requiring the debtor to continue to pay the extraordinary rate are abundant; but no case has been found expressly deciding what rule should be applied where the agreed rate is less than the legal rate. See cases collected in note to *O'Brien* v. *Young* (N. Y.), 47 Am. Rep. 74.

WHILE it is well settled that the assignee of a chose in action takes subject to all the equities of the debtor against the assignor, existing at the time of the assignment—in other words, stands in the shoes of his assignor—yet, if he purchases in good faith, he does not take subject to the equities of *third persons*, who are not parties to the transaction, and of whose equities he has no notice. Thus, where a guardian, holding a bond payable to him as guardian, assigned it to one of his wards upon her attaining her majority, in payment of the balance in his hands belonging to her, the title of the assignee thereto was held not to be affected by the fact, subsequently disclosed, that another ward owned one-half interest in the bond—the assignee having taken without notice of such interest. *Hunter* v. *Lawrence*, 11 Gratt. 111. See also *Broadus* v. *Rosson*, 3 Leigh, 12; *Moore* v. *Holcomb*, 3 Leigh, 597; *Mott* v. *Clark*, 9 Pa. St. 399 (49 Am. Dec. 566, and note).

It is important to observe that under the Virginia statute giving the assignee the right to maintain in his own name any action which his assignor might have maintained (Va. Code, sec. 2860), the assignee cannot maintain the action save where it might have been maintained by his assignor. Thus where there are two firms with a common member, and one of the firms is indebted to the other, if the creditor firm assigns its claim to a third person, such third person cannot maintain an action against the debtor firm, at law, because his assignor could not have maintained it—it being a well-settled rule that one firm cannot sue another at law, where there is a common member, since such common member would be both plaintiff and defendant—an anomaly which the courts of law will not sanction. *Aylett* v. *Walker*, 92 Va. 540 (24 S. E. 226).

It will sometimes happen that, by the operation of an estoppel, the assignee will get a better title than the assignor had. Thus, where one makes his bond to another for the accommodation of the latter, in order that the bond may be assigned to a third person, to raise money for the obligee's benefit, the obligor cannot, in a suit brought against him by the assignee, set off a note for the same amount held by him against the assignor and executed for the very purpose of being used as a set-off, since this would be a fraud upon the assignee. *Etheridge* v. *Parker*, 76 Va. 247. Again, a promise made by the maker of a common-law instrument made to the assignee after the assignment is *nudum pactum* and not binding. *Hopkins* v. *Richardson*, 9 Gratt. 485. But if the promise be made before, and with a view to, the assignment, or if the assignee alters his condition for the worse, or foregoes any right, on

account of the promise, or, if when applied to by the proposed assignee for information, the debtor assures him that the debt is good and will be paid, then the debtor is estopped, in a suit brought by the assignee, to set up any equities existing between him and the assignor. *Hansbrough* v. *Baylor*, 2 Munf. 36; *Feazle* v. *Dillard*, 5 Leigh, 30; *Stebbins* v. *Bruce*, 80 Va. 389; *Etherige* v. *Parker*, *supra*; *Nicholas* v. *Austin*, 82 Va. 817. See *Welch* v. *Ebersole*, 75 Va. 652.

So far is this doctrine carried, that the maker of a note founded upon a usurious or gaming consideration may estop himself from setting up the defence against a *bona fide* purchaser of the debt, who takes an assignment of it on the faith of the maker's assurance that it is a valid debt and will be paid. *Woodson* v. *Barrett*, 2 H. & M. 50; *Pettitt* v. *Jennings*, 2 Gratt. 676; *Nicholas* v. *Austin*, 87 Va. 817.